(3)

No. 08-1144

IN THE

Supreme Court of the United States

J. L. SPOONS, INC., *et al.*,

Petitioners,

—v.—

HENRY GUZMÁN, DIRECTOR,
OHIO DEPARTMENT OF PUBLIC SAFETY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

J. MICHAEL MURRAY
Counsel of Record
LORRAINE R. BAUMGARDNER
BERKMAN, GORDON, MURRAY
& DEVAN
55 Public Square, Suite 2200
Cleveland, Ohio 44113
(216) 781-5245

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont'd)

CONSTITUTIONAL PROVISION

STATUTES, RULES AND REGULATIONS

MISCELLANEOUS

REPLY BRIEF FOR THE PETITIONERS

The conflict between the decision below of the Sixth Circuit Court of Appeals and the established precedent of the Third, Fourth, Fifth, Seventh, and Eighth Circuit Courts of Appeals is not "illusory," as Respondents claim, but is authentic, unambiguous and in need of resolution by this Court.

I. THE DECISION BELOW CONFLICTS WITH THAT OF EACH CIRCUIT COURT OF APPEALS THAT HAS EVALUATED A REGULATION OF EXPRESSIVE NUDITY AND SEXUALLY SUGGESTIVE TOUCH UNDER THE OVERBREADTH DOCTRINE.

Until the Sixth Circuit's ruling here, every circuit court that has reviewed a law regulating expressive nudity and sexually suggestive touch in artistic, theatrical performances, not associated with adverse secondary effects, has concluded that such regulation is unconstitutionally overbroad. *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135-36 (6th Cir. 1994); *Ways v. City of Lincoln*, 274 F. 3d 514, 519 (8th Cir. 2001) (ordinance found unconstitutional because it "was not tailored to combat" secondary effects and did not "exclusively cover conduct in adult entertainment businesses...."); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 515-16 (4th Cir. 2002) (liquor regulations found unconstitutional because they "[swept] far beyond bars and nude dancing establishments" and "reach[ed] a great deal of expression in the heartland of [the First Amendment's] protection" and no evidence existed to show that non-adult venues produced adverse secondary effects); *Odle v. Decatur County, Tenn.*, 421 F.3d 386, 395-96 (6th Cir. 2005) (same); *Conchatta v. Miller*, 458 F.3d 258, 268 (3rd Cir. 2006) (liquor regulations found

unconstitutional because no evidence produced to show their application to ordinary theater and ballet prevented adverse secondary effects associated with topless clubs); *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 654 (6th Cir. 2007) (observing without deciding that state liquor regulations were unconstitutionally overbroad because they proscribed "expressive conduct in theatrical and other type performances which there is no reason to believe had any negative secondary effects"); *See also Schultz v. City of Cumberland*, 228 F.3d 831, 849 (7th Cir. 2000) (finding ordinance was susceptible to limiting construction that confined its reach to adult establishments, thus saving it from fatal overbreadth).

In upholding the constitutionality of Rule 52, the court below disregarded the constitutional principle that courts of the other circuits–as well as prior panels in its own circuit–had agreed was required by the precedents of this Court.

As the dissent observed:

> [T]he majority has set itself apart from nearly every other court to consider an overbreadth challenge to a similar statute or regulation.

App. 28.

Respondents argue, however, that no conflict exists because, they maintain, the laws under review in the other cases "all involve[d] much broader prohibitions on nudity or sexual activity" than Rule 52's. Opp. at 8. As we will see shortly, Respondents are

just flat out wrong about this.

But perhaps more fundamentally, the underlying assumption of this contention–that whether a conflict exists here depends upon how closely the underlying regulations at issue in each case mirror each other in their definitions of nudity and sexually suggestive touching–is wrong. The holding of court after court reviewing regulations of constitutionally protected nude dancing or other sexually oriented performances, ***however defined***, is that such regulations may be upheld against an overbreadth challenge only if they are narrowly tailored to reach only performances and establishments shown to cause adverse secondary effects.

Here, it is undisputed that Rule 52 prohibits nudity (actually semi-nudity) and touching of erogenous zones in serious, artistic performances in thousands of venues not in any way associated with negative secondary effects. The court below acknowledged this. App. 11. But rather than striking down Rule 52 as unconstitutional under the rule of law followed by other courts, the Sixth Circuit upheld its restrictions on constitutionally protected speech, creating a clear and unambiguous conflict.

Moreover, as earlier mentioned, Respondents are sorely mistaken in the first instance that Rule 52 is more "narrowly" or "closely drawn" than the laws at stake in *Conchatta*, *Carandola*, and *Ways*. Opp. at 9-12.

At issue before the Third Circuit in *Conchatta* were state liquor regulations making it unlawful "for any licensee, under any circumstances, to permit in any

licensed premises or place operated in connection therewith any lewd, immoral or improper entertainment...." The Third Circuit emphasized that its determination that the liquor regulations were overbroad, was premised on the assumption that "lewd entertainment" proscribed no more than nudity or sexual touching. The court wrote:

> We need not here predict, however, how expansively the Pennsylvania courts might construe the prohibition because we conclude, in light of the broad array of forms of entertainment to which the prohibition is applicable, that even assuming the [regulations] proscribe no more than entertainment involving nudity or genital touching, those Provisions are unconstitutionally overbroad.

Id. at 266. Thus, contrary to Respondents' claim, the laws' proscriptions at issue in *Conchatta* as construed by the Third Circuit were far ***narrower*** than Rule 52.

While the regulations in *Conchatta* restricted nudity, Rule 52 prohibits, among other things, "the showing of...buttocks with less than a fully opaque covering" as well as a "device, costume or covering" that gives the appearance of nudity. And while the regulations in *Conchatta* restricted genital touching, Rule 52 extends to "any touching of an erogenous zone." Rule 52's prohibitions effect a greater intrusion into the presentation of artistic expression than the regulations struck down as unconstitutionally overbroad by the court in *Conchatta*

Similarly, the relevant provisions of the North Carolina statute and rule struck down as unconstitutionally overbroad in the Fourth Circuit's decision in *Carandola* had a much narrower sweep than their Rule 52 counterparts.

The North Carolina liquor regulations prohibited "the display of pubic hair, anus, vulva or genitals" and "the touching...of the breasts, buttocks, anus, vulva or genitals." *Id.* at 510. Again, both of its proscriptions were more closely drawn than Rule 52's, and both provisions were struck down as unconstitutionally overbroad.

Rule 52's prohibitions cut a much wider swath in regulating the content of mainstream theater and dance productions than those in *Carandola.* Not only do they prohibit the "display of pubic hair, anus, vulva or genitals" as the regulations found to be unconstitutional in *Carandola* did, but they prohibit a fully-clothed dancer from wearing a body suit that gives the appearance that he or she is nude, prohibit a performer in a beach scene from wearing a bathing suit that does not fully and opaquely cover his or her buttocks, and prohibit a performer from "dropping his drawers" for comedic effect.

Similarly, Rule 52 not only prohibits "the touching of breasts, buttocks, anus, vulva or genitals" as did the unconstitutional regulations in *Carandola*, but it prohibits a performer from romantically stroking his or her fellow actor's thigh in a love scene, restricts the sensual caresses of a flamenco dancer performing an alegría, and prohibits a dramatic scene of seduction from including any touching of buttocks, thigh, breast,

or any other potential "erogenous zone."

The same is true with regard to the ordinance at issue in *Ways*. That ordinance, struck down by the Eighth Circuit as overbroad, contained no proscriptions against nudity or semi-nudity as Rule 52 does. And thus unlike Rule 52, it posed no impediment to the presentation of mainstream, artistic performances such as *Equus* or *Wit*. For this reason alone, it was much less restrictive than Rule 52.

Moreover, the ordinance's prohibitions against "intentional touching of a person's sexual organ, buttocks, or breasts" and"kissing, when such contact [could] reasonably be construed as being for the purpose of sexual arousal or gratification of either party or any observer," *id.* at 516, were narrower than Rule 52's wide-ranging ban against touching another's erogenous zones–including "without limitation" the touching of a person's thigh or whatever other areas of the body might be considered erogenous zones–for the purpose of sexually arousing or gratifying either the performer or his or her fellow actor.[1]

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[1] Respondents argue that Rule 52's language defining conduct subject to its prohibitions as touching "for the purpose of sexually arousing or gratifying ***either person***," confines its reach and excludes protected artistic expression, in contrast to the regulation at issue in *Ways*. Opp. 10. The language of the regulation does not remove suggestive sexual touching in artistic theatrical or dance performances from its reach, however.

Without indulging in an esoteric examination of stage and dance, it nevertheless seems clear that a compelling and convincing performance of a love scene or balletic seduction requires its performers to experience and portray the emotions and physical reactions characteristic of those intimacies –such as

Nor do the Respondents' arguments bridge the gap in analysis between the decision below and that of the courts in *Schultz* and *J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998). The courts in both those cases determined that the laws before them cleared the constitutional bar only because they could be interpreted as excluding serious, artistic performances from their regulation.

The Sixth Circuit's decision, therefore, conflicts with those of the Third, Fourth, Fifth, Seventh, and Eighth Circuit Courts of Appeals.

Indeed, the departure by the court below from the established precedent in its own circuit underscores the extent of the divide. Pet. at 22-28.

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arousal, stimulation, and gratification–bringing those performances within the ambit of the rule. See L. Strasberg, *A Dream of Passion: The Development of the Method*, (Little, Brown and Company 1987), pp. 164-65. ("The actor must be able to create not only the behavior, but the state of mind and the emotional experience of the character....If he knows how to create the proper sensory and emotional experiences which motivate and accompany the behavior of the character, he will be accomplishing the primary task of the actor: to act–that is, to do something, whether it be psychological or physiological.") And to the extent that some actors only imitate those responses, it puts law enforcement authorities in the precarious position of trying to determine which performer is actually aroused and gratified and which is not, *see e.g.*, Meg Ryan's infamous "I'll have what she's having" scene in When Harry Met Sally. http://www.youtube.com/watch?v=5nNhOH4Y0bI (last visited June 16, 2009)–a circumstance imbuing the authorities with a dangerous degree of unguided discretion.

II. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY, NOT AFFORDED TO IT IN *BARNES v. GLEN THEATRE, INC.*, 501 U.S. 560 (1991) AND *CITY OF ERIE v. PAP'S A.M.*, 529 U.S. 277 (2000), TO DECIDE ISSUES OF OVERBREADTH RAISED BY A REGULATION PROHIBITING EXPRESSIVE NUDITY.

Respondents contend that "review is not needed" to address the issue left open in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000): is a regulation of expressive nudity unconstitutionally overbroad when it applies to mainstream theater and dance performances?

Theaters, museums, theatrical producers, dancers and other artists who must decide whether to proceed with the presentation of a play or modern dance with abbreviated costuming or a scene of passionate lovemaking which, under a regulation like Rule 52, places the venue in which it is performed in jeopardy of having its license to serve alcohol revoked, would disagree. The thirty-one states and the host of county and municipal governments who have drafted similar regulations[2] would also disagree. And courts faced with trying to reconcile the irreconcilable–a circumstance created by the decision here–most certainly would disagree.

Moreover, leaving the decision below untouched, as Respondents urge, muffles the First Amendment rights of more than 11-million Ohioans and opens the door to similar censorial regulations in Michigan,

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[2] *See* Pet. at 4, n.1; 5, n. 2.

Kentucky, and Tennessee–states whose federal district courts fall within the Sixth Circuit.

The rule upheld by the court below restricts the presentation of constitutionally protected expression including dance, theater, political satire, comedy, and other performances in which the actors appear in abbreviated costumes or include sexually suggestive touching, in thousands of venues across the State of Ohio.

In their Brief in Opposition, Respondents claim that Petitioners' representation of Rule 52's broad scope and application is "without concrete evidence" and is exaggerated. Opp. at 18. Again, Respondents are mistaken.

Petitioners predicate their description of Rule 52's breadth on the testimony under oath of Respondents' ***own agents*** charged with the administration and enforcement of Ohio's liquor regulations. The Assistant Deputy Director of Operations for the Ohio Department of Public Safety, who is responsible for enforcing the State's liquor regulations, testified under oath that Rule 52 applied to every establishment holding a liquor permit in the State of Ohio–among which were roughly 12,000 venues where live entertainment could be presented. (Pohlman, Tr. at 159, 189-91; JA 224, 254-56).[3] The Deputy Director of the Ohio Department of Public Safety, who is "the CEO of the state law enforcement agency charged with law enforcement" of

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[3] The transcript of the proceedings in the district court is reproduced in the Joint Appendix filed in the court below at JA 66 to JA 371.

Ohio's liquor laws, likewise testified under oath that Rule 52 applied to all establishments licensed to sell alcohol and that the Rule prohibited performances in which a person appeared with "less than a fully opaque covering"on their buttocks or a "fleeting scene involving the exposure of a woman's aerola and nipple" in all such venues. (Duvall, Tr. at 31, 32, 37; JA 348, 349, 354). The Executive Director of the Ohio Liquor Control Commission, the administrative agency that wrote and promulgated Rule 52, testified under oath that it was "impossible to have a rule" that excepted serious, artistic entertainment, and that he was "aware of" a citation against the production of *Oh! Calcutta!* in the 1980s. (Anderson, Tr. at 225-26; JA 290-91).

As for the broad range of artistic and serious live entertainment restricted by Rule 52, Petitioners' expert, Dr. Judith Hanna identified a number of examples of performances that would be eliminated or restricted by the rule:

> [T]here's a ballet called *Prodigal Son* that is done by a number of our major dance companies. And in *Prodigal Son*, the young man is seduced by a siren, and she has him put his hand on her breast and on her crotch. And I mean, that would be one example.
>
> Another example would be Paul Taylor's modern dance, *Big Bertha*, which is about a dysfunctional family. It starts out with the dancer turning on [a] [n]ickelodeon, and it plays through, including the father molesting the daughter and committing

incest. So you see that on stage.

In the theater you have *Oh! Calcutta!* where you have male and female completely nude touching. So you have groupies and you have partners, you have–nudity is a tradition in the arts. In ballet it goes back to 1840. And in the '60s you had a big florescence of nudity on stage. The Rainier Trio in the 1960s did a performance where the dancers were all nude, and they had American flags around their neck[s], and it was communicating messages of censorship.

There were, for example, in the nation's capitol Bilty Jones did a performance called *Still There* –no it was *Uncle Tom's Cabin.* I forget the exact title. But there were 50 people on stage. There were members of his company, there were members from his community. So you had tall and short, and you had fat and thin, and you had people of all different colors and all different gender orientations, and the message was to convey the common humanity of man.

In terms of touch in theater, Tennessee Williams [in] *A Streetcar Named Desire*, where Blanch, who was a prostitute but is putting on pretension of high class, is assaulted by her brother-in-law.

(Hanna, Tr. at 25-26, JA 90-91.) To this list of productions that would be barred by Rule 52, Dr. Hanna

also added Sam Shepard's play, *Buried Child*; the musical, *Hair*; the drama, *Equus*; the ballets, *Mutations* and *Fuga*; and the performance art in *Puppetry of the Penis*. *Id.* at 26-29, JA 91-94. Ballroom dancing performed before an audience such as the tango and salsa would also be restricted by Rule 52's prohibitions. *Id.* at 26, 30; JA 91, 95.

Rule 52's application to thousands of venues where legitimate, mainstream entertainment is offered and its choke-hold on a large and vital body of artistic expression was meticulously demonstrated by the evidentiary record. It captures a substantial amount of vibrant and important expression within its noose. The decision of Sixth Circuit Court of Appeals upholding Rule 52, therefore, merits review and reversal under the First Amendment by this Court.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

J. MICHAEL MURRAY
(*Counsel of Record*)
LORRAINE R. BAUMGARDNER
Berkman, Gordon, Murray & DeVan
55 Public Square, Suite 2200
Cleveland, Ohio 44113
Telephone (216) 781-5245

Counsel for Petitioners